UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MELVIN JONES, JR., Plaintiff, v. MICHAEL A. TOZZI et al., Defendants.	1:05-CV-0148 OWW DLB MEMORANDUM DECISION AND ORDER RE DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the court for decision is yet another round of potentially dispositive motions in this case. Defendant Hollenback moves to dismiss Plaintiff's fifth amended complaint, or, in the alternative, for summary judgment on all of Plaintiff's claims. (Doc. 235.)

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of a child custody dispute between Plaintiff and Kea Chhay, the mother of Plaintiff's minor child. The case was first filed in Santa Clara Superior Court, but was later transferred to Stanislaus County. Additional factual background concerning the state proceedings is set forth in

various memorandum opinions in this case and related cases.[1]

Plaintiff filed his initial complaint on February 3, 2005. (Doc. 1.) Then, prior to the filing of any responsive pleading by Defendant, Plaintiff filed a first amended complaint on March 3, 2005. (Doc. 7.) The first amended complaint named as defendants: Michael A. Tozzi, the Executive Officer of Stanislaus County Superior Court; Superior Court Judge Marie Sovey-Silveria; and attorneys Leslie Jensen and John Holenback.

Defendants Tozzi and Silveria moved to dismiss on March 9, 2005. (Doc. 8.) Plaintiff opposed this motion (Doc. 13, filed Mar. 14, 2005), and moved for default judgment against Defendants Jensen and Hollenback. (Doc. 14, filed Mar. 14, 2005.) Plaintiff then (improperly) filed an additional "counter motion" in opposition to Defendants Tozzi and Silveria's motion to dismiss, along with a motion to amend the complaint a second time. (Doc. 16, filed Mar. 24, 2005.) Four days later, on March 28, 2005, Plaintiff lodged yet another "second amended complaint" to "supercede" the second amended complaint that was attached to his motion for leave to amend. (Doc. 19, filed Mar. 28, 2005.)

On March 18, 2005, an order issued dismissing Plaintiff's related case, *Jones v. Strangio*. (*See* Doc. 72, 1:04-cv-06567.) In light of that dismissal, the district court ordered Plaintiff to show cause why this case should not be dismissed as well. (Doc. 18, filed Mar. 29, 2005.) Plaintiff responded to the order to show cause on April 20, 2005. (Doc. 29.) At the same time,

---

[1] *See Jones v. California*, 1:04-CV-065676; *Jones v. Strangio*, 1:04-CV-06567; and *Jones v. Strangio*, 1:05-CV-00410.

Plaintiff filed yet another (third) proposed amended complaint intended to supercede the complaint lodged on March 28, 2005. (*See* Proposed "Second Amended Complaint" lodged Apr. 20, 2005.) This complaint contained numerous new allegations that Defendants made racially derogatory remarks to Plaintiff as part of a conspiracy to violate his constitutional rights in contravention of 42 U.S.C. §§ 1981, 1985, and 1986.

A memorandum decision and order dated May 11, 2005 dismissed all claims against Defendants Tozzi and Silveria on immunity grounds, denied Plaintiff's motion for default judgment against Defendants Jensen and Hollenback, and denied Plaintiff's motion for leave to amend the complaint a second time. (Doc. 47.)

On June 22, 2005, Defendants Jensen and Hollenback's motion to dismiss was granted, affording Plaintiff one final opportunity to amend the complaint. (Doc. 61.) A separate memorandum decision, dated June 29, 2005, denied Plaintiff's April 9, 2005 motion for sanctions. (Doc. 65.) On July 6, 2005, Plaintiff voluntarily dismissed Defendant Jensen from the case. (Doc. 66.) Plaintiff then filed a second amended complaint alleging that Defendant Hollenback directed racially derogatory remarks to Plaintiff with the goal of deterring Plaintiff's participation in legal proceedings related to Plaintiff's family law case. (*See* Doc. 67, filed July 6, 2005.

Defendant Hollenback moved to dismiss the second amended complaint on a variety of grounds. (Doc. 78, filed Sept. 8, 2005.) Defendant Hollenback also moved for sanctions, alleging that Plaintiff made false statements in his amended complaint. (Doc. 91, filed Sept. 27, 2005.) Both motions were denied.

(Doc. 103.)

Plaintiff filed a motion for summary judgment. (Doc. 104, filed Oct. 31, 2005.) Defendant failed to timely file an opposition. The court then issued a warning to Defendant about a litigant's obligation to file an opposition or statement of non-opposition at least fourteen days prior to the hearing pursuant to Local Rule 78-230(c). (Doc. 118.) Defendant filed a proposed opposition along with a request for leave to late-file the opposition. (Doc. 120, filed Dec. 5, 2005.) Plaintiff objected to granting Defendant leave to file this opposition and submitted that he is entitled to judgment as a matter of law. (Docs. 115, 116, 119, 128 & 129.) Plaintiff continued to insist on a speedy trial.

A hearing on the motion for summary judgment was held December 12, 2005. The district court granted Defendant's request to late file-his opposition and denied Plaintiff's motion for summary judgment, but granted Plaintiff's motion for leave to amend the complaint to add state law claims. (Doc. 185, filed February 15, 2006.)

Plaintiff filed his second amended complaint on February 8, 2006 (Doc. 182.), alleging that Defendant Hollenback became involved with Plaintiff's family law dispute in December 2003 as counsel for Ms. Chhay. (Doc. 67 at ¶44.) Plaintiff filed contempt charges against Ms. Chhay in early 2004 to enforce a court order. (*Id.* at ¶ 45.) Plaintiff alleges that on April 22, 2004, Defendant Hollenback told Plaintiff that he "called the Stanislaus County Housing Authority and told them what a lazy low-life black piece of shit you are...you get nigger justice."

(*Id.* at ¶ 47.) Plaintiff also alleges that "after the child support trial and out of court" Defendant Hollenback stated that "he would knock the teeth out of his black greasy face...and rattle them out of his jive-monkey ass if he showed up for the contempt hearings." (*Id.* at ¶48.) Plaintiff asserts that "as a direct and proximate cause of the defendant's threats, [he] withdrew [the] contempt charges...." (*Id.* at ¶51.) The complaint further alleges that the statute of limitations on the contempt charges expired in July 2004. (*Id.* at ¶54.) As a result, "Mr. Jones' access to the judicial system was deprived." (*Id.*)

The second amended complaint alleged that Defendant's alleged conduct deprived Plaintiff of his civil rights in violation of 42 U.S.C. § 1981 and also included included a number of state law claims (Slander Per Se, Intentional Interference with Contractual Relations, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress). Plaintiff included Leslie Jensen as a defendant in many of the claims in the second amended complaint, without first obtaining leave to reinstate Leslie Jensen as a defendant.

Plaintiff at one point presented an affidavit from his mother, Rosalind Jones. (Doc. 108.) Ms. Jones's statements in the affidavit corroborate Plaintiff's accusations that Hollenback made racially derogatory statements to Plaintiff. (*Id.* at 3.) Defendant sought to conduct further discovery regarding Ms. Jones' statements. Throughout December 2005 and January 2006, the parties engaged in formal discovery disputes over the method,

timing, and circumstances of any such discovery. As is the normal practice in this district, these discovery disputes were heard before a United States Magistrate Judge, in this case, the assigned Magistrate Judge, Dennis L. Beck. After a hearing on February 3, 2006, Judge Beck issued an order denying Plaintiff's motion for a protective order and granting Defendant's motion to compel Ms. Jones to participate in an oral deposition. (Doc. 181, filed February 8, 2006.) Shortly after the adverse ruling, Plaintiff moved to recuse Judge Beck from participating in this case. (*See* Doc. 179.)

A few weeks after filing his second amended complaint, Plaintiff moved yet again for leave to amend, again alleging federal and state law claims against both Hollenback and Jensen. (*See* Doc. 190, third amended complaint, filed Feb. 22, 2006.)

Defendant Hollenback moved to dismiss all the claims in the second amended complaint (Docs. 191 & 2), and Defendant Jensen objected to being reinstated as a defendant after her dismissal. (Doc. 209.) Both Defendants moved to strike all of the state law claims pursuant to California's anti-slapp statute. (Docs 194 & 197.) Plaintiff opposed the motions to dismiss and to strike, and asserted his own anti-slapp motion to strike. A memorandum decision and order dated June 2, 2006 (1) denied Plaintiff's motion for leave to file his third amended complaint; (2) granted Defendant Jensen's motion to strike her as a defendant from the operative second amended complaint; (3) granted Defendant Hollenback's motion to dismiss all the claims in the case (federal and state); (4) and denied as moot the motions to strike. (Doc. 228.) Plaintiff was given "one final opportunity

to frame a complaint under 42 U.S.C. § 1985 and 1986." (*Id.*)

Plaintiff filed his fifth amended complaint ("FAC") on June 13, 2006, which is summarized below. (Doc. 230.) Plaintiff then moved to set a scheduling conference and set that motion for hearing on July 17, 2006. (Doc. 19, 2006.) Subsequently, Defendant Hollenback moved to dismiss the FAC on numerous grounds or, in the alternative, for summary judgment. (Doc. 234, filed June 29, 2006.) Plaintiff opposes the motion to dismiss, arguing that he has satisfied the pleading requirements. Plaintiff also opposes summary judgment with his own affidavits, but he requests that decision on the motion for summary judgment be delayed until he has had an opportunity to conduct discovery. No party clearly explains the extent of discovery that has taken place thus far, although the record appears to indicate that Plaintiff has at least served some requests for admissions on Defendant HOllenback. Plaintiff represented during oral argument that in the one and one-half years this case has been pending he has not yet taken adequate discovery because (1) he only recently advanced the specific legal theory upon which his claims now rest and (2) he lacks the financial capacity to pursue certain forms of discovery. (*See* Doc. 243, Ex. D.)

III. SUMMARY OF THE OPERATIVE FIFTH AMENDED COMPLAINT

Plaintiff's FAC appears to allege that Defendant Hollenback participated in four separate conspiracies, along with various other individuals, to deprive Plaintiff of his civil rights in violation of 42 U.S.C. §§ 1985 and 1986. Three of the alleged

conspiracies are at least tangentially related to Plaintiff's efforts to litigate in state court (the "state court conspiracies"; the fourth is distinct, in that it alleges a conspiracy to impede access to federal court (the "federal court conspiracy").

First, Plaintiff describes an alleged conspiracy between Hollenback and Leslie Jensen. (FAC, ¶¶ 45-58.) It is not easy to determine the nature of the alleged conspiracy from the text of the complaint, but it appears that Plaintiff is asserting that, together, Jensen and Hollenback through threats and intimidation: (a) impeded Plaintiff's access to state court, (b) impeded his ability to pursue his rights under the custody order issued by the Stanislaus Court, and (c) impeded his ability to apply for employment with the Stanislaus County Housing Authority. Specifically, Plaintiff alleges that Hollenback told Plaintiff that "[Hollenback] called the Stanislaus County Housing Authority," where plaintiff had recently applied for employment "and told them what a lazy low life black piece of shit [Plaintiff is]" and exclaimed "you get nigger justice." (FAC at ¶47.) Plaintiff further alleges that Hollenback threatened that "he would knock the teeth out of his black greasy face...and rattle them out of his jive-monkey ass if he showed up for the contempt hearings." (*Id.*) Separately, Plaintiff alleges that Ms. Jensen threatened that Plaintiff would "get his black ass kicked if he continued to make trouble for the court and if Plaintiff continued with the contempt proceedings." (*Id.*) Plaintiff alleges that there is circumstantial evidence that Hollenback and Jensen conspired with one another to intimidate

him. Specifically, Plaintiff notes that Hollenback and Jensen have been colleagues practicing before the Stanislaus Superior Court for many years. Plaintiff also alleges that Hollenback and Jensen contracted with one another to cover each other's court appearances.

Next, Plaintiff alleges that Hollenback conspired with state courtroom bailiff Jane Doe. (*Id.* at ¶52.) Specifically, Plaintiff asserts that he heard Hollenback tell the bailiff that Plaintiff was a "low life black." The bailiff apparently became agitated as a result. However, Jones asserts that he continued with his scheduled hearing after reassuring the bailiff that he was "not a low life black."

In the final purported state court conspiracy, Plaintiff names as co-conspirators various individuals who were previously named as Defendants in this case. He alleges that Michael Tozzi (the Executive Officer of the Stanislaus County Superior Court), Steven Carmichael (the Court appointed Evaluator), Don Strangio (the Court appointed Family Law Mediator), Ms. Jensen, the "Jane Doe" bailiff from the April 22, 2004 hearing, and Marie Sovey-Silveria (the Family Law Judge who issued the December 10, 2002 cusody order), agreed to deprive Plaintiff of the opportunity to access state court and to pursue his rights under a custody order entered by the Stanislaus court. Plaintiff also alleges a separate conspiracy involving all of these individuals to retaliate against him. Plaintiff alleges that Tozzi, Silveria, Strangio, and Carmichael all conspired to aid in planning this conspiracy and in concealing the existence of the conspiracy. (*Id.* at ¶81.) More specifically, Plaintiff alleges

(a) that Carmichael acted in furtherance of the conspiracy when he commented that Whites and Asians are "better at education than Blacks;" and (b) that Tozzi contributed to the conspiracy by failing to comply with a subpoena sent to him by Plaintiff. No specific factual allegations are made with regard to Silveria or Strangio.[2]

Finally, Plaintiff describes a conspiracy between Hollenback, Leslie Jensen, and Lonnie Ashlock to impede Plaintiff's ability to access federal court. (*Id.* at ¶59-68.) Apparently, Plaintiff and Lonnie Ashlock were parties to several real estate agreements, including an a rental agreement and an agreement pursuant to which Plaintiff sold a house to Ashlock. Leslie Jensen admits that she has served as Lonnie Ashlock's attorney on many occasions. Plaintiff asserts that Mr. Ashlock threatened Plaintiff that if Plaintiff did not drop his litigation against Jensen he would "not pay him one cent" pursuant to the house sale. Plaintiff was later evicted from his residence and now asserts that this eviction was in retaliation for Plaintiff's legal actions and in furtherance of the "conspiracy." Plaintiff claims that Ms. Jensen made misrepresentations to the Court in an effort to "conceal" this perceived "conspiracy." The Complaint does not clearly explain

---

[2] Plaintiff reiterates essentially the same fact pattern in support of a separate conspiracy between Hollenback, Tozzi, Strangio, Carmichael, Jensen, and Silveria, to "impede his access to petition the state court," and notes that the right to petition is one aspect of an individuals First Amendment right to free speech. (*Id.* at 84-91.) It appears that Plaintiff is attempting to articulate several different theories of liability for the same conduct.

how Hollenback was involved in this conspiracy and the only stated explanation of Hollenback's wrongful conduct was "his apparent silence" about the alleged "conspiracy." (*Id.* at ¶67.)

IV. STANDARDS OF REVIEW

A. Motion to Dismiss.

In deciding whether to grant a motion to dismiss, a court must "take all of the allegations of material fact stated in the complaint as true and construe them in the light most favorable to the nonmoving party." *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002). In general, "a *pro se* complaint will be liberally construed and will be dismissed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). However, "a liberal interpretation of a [pro se] complaint may not supply essential elements of the claim that were not initially pled." *Id.*

B. Motion for Summary Judgment

Summary judgment is warranted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. Pro. 56(c); *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). Therefore, to defeat a motion for summary judgment, the non-moving party must show (1) that a genuine factual issue exists and (2) that this factual issue is material. *Id.* A genuine issue of fact exists when the non-moving party produces evidence

on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986). The evidence must be viewed in a light most favorable to the nonmoving party. *Indiana Lumbermens Mut. Ins. Co. v. West Oregon Wood Products, Inc.*, 268 F.3d 639, 644 (9th Cir. 2001), *amended by* 2001 WL 1490998 (9th Cir. 2001). Facts are "material" if they "might affect the outcome of the suit under the governing law." *Campbell*, 138 F.3d at 782 (quoting *Liberty Lobby, Inc.*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001). If the moving party fails to meet this burden, "the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). However, if the nonmoving party has the burden of proof at trial, the moving party must only show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden of proof, the non-moving party must produce evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *Triton Energy Corp.*, 68 F.3d at 1221. The nonmoving party cannot simply rest

on its allegations without any significant probative evidence tending to support the complaint. *Devereaux*, 263 F.3d at 1076.

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp., 477 U.S. at 322-23.

"In order to show that a genuine issue of material fact exists, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Rivera v. AMTRAK*, 331 F.3d 1074, 1078 (9th Cir. 2003) (quoting *Liberty Lobby, Inc.*, 477 U.S. at 249). If the moving party can meet his burden of production, the non-moving party "must produce evidence in response....[H]e cannot defeat summary judgment with allegations in the complaint, or with unsupported conjecture or conclusory statements." *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). "Conclusory allegations unsupported by factual data cannot defeat summary judgment." *Rivera*, 331 F.3d at 1078 (citing *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001)).

The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *See United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1996). Nevertheless, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." *Liberty*

Lobby, Inc., 477 U.S. at 255. A court's role on summary judgment is not to weigh evidence or resolve issues; rather, it is to find genuine factual issues. *See Abdul-Jabbar v. G.M. Corp.*, 85 F.3d 407, 410 (9th Cir. 1996).

V. DISCUSSION

A. Legal Background.

Plaintiff alleges that the various conspiracies described in the complaint violate provisions of 42 U.S.C. § 1985 as well as 42 U.S.C. § 1986.

Section 1985 prohibits several forms of conspiracies to deprive individuals of the rights and privileges held by a citizen of the United States. The provision states in its entirety:

> (1) Preventing officer from performing duties
>
> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

//

//

//

//

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Sub-section 1985(1), which deals with conspiracies to impede federal officials in the performance of their official duties is not implicated by Plaintiff's complaint.

Plaintiff does allege claims under both clauses of § 1985(2). Plaintiff alleges that the first clause of § 1985(2) which concerns conspiracies to obstruct justice in the federal courts, was violated by the purported threats made by Jensen through Lonnie Ashlock. The First Clause of § 1985(2) makes it unlawful:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified...

42 U.S.C. § 1985(2). To ultimately prevail on such a claim, a Plaintiff must demonstrate the existence of (1) a conspiracy, (2) to deter testimony in a federal court by force or intimidation, and (3) injury to the plaintiff. *Brever v. Rockwell Intern. Corp.*, 40 F.3d 1119, 1126 (10th Cir. 1994).

Plaintiff alleges that several of the other purported conspiracies constitute violations of the second clause of § 1985(2), which applies to conspiracies to obstruct the due course of justice in any State. Specifically, § 1985(2) makes it unlawful for:

> two or more persons [to] conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

The clause is actually divided into two separate sub-clauses, the first applying to conspiracies to impede the due course of justice in any state with the intent to deny to any citizen the equal protection of the laws, the second applies to conspiracies to injure a person for enforcing, or attempting to enforce, the right of any person to the equal protection of the laws. To prove a claim under either sub-clause, a plaintiff must demonstrate racial animus. *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985). Therefore, to ultimately prevail on such a claim, Plaintiff must establish

(1) a conspiracy,

(2) motivated by race or class-based animus,

(3) either to

(a) impede, hinder, obstruct, or defeat, the due course of justice in any state, with the intent to deny any citizen the equal protection of the laws.

(b) to injure a citizen for enforcing or attempting to enforce the right of any citizen to the equal protection of the laws.

Plaintiff's complaint also purports to state claims under § 1985(3), entitled "depriving persons of rights or privileges." Section 1985(3) is divided into three parts. The first part prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3).[3] The second

[3] The first clause of § 1985(3) provides:

part prohibits conspiracies to interfere with federal elections, *see generally* Bretz , 773 F.2d at 1028 n.3, and is not implicated in this case. The third clause provides a cause of action in federal court for the victim of conspiracies prohibited by § 1985(3).

As is the case with the second clause of § 1985(2), to state a claim under the first part of § 1985(3) (conspiracies to deprive an individual of equal protection of the laws or equal privileges and immunities), plaintiff must show "discriminatory animus." In other words, Plaintiff must allege that the conspiracy was motivated by racial discrimination. *Griffen v. Breckenridge*, 403 U.S. 88, 101-102 (1971); *see also Kush v. Rutledge*, 460 U.S. 719, 725 (1983). In addition, Plaintiff must allege (1) a conspiracy, (2) to deprive any person (or class of persons) of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act performed by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage, or a deprivation of any right or privilege of a citizen of the United States. *Griffen*, 403 U.S. at 102-103.

Finally, Plaintiff alleges that Hollenback's conduct also violated 42 U.S.C. § 1986, which establishes a private right of

---

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws....

action for damages against a person who knowingly failed to prevent a § 1986 conspiracy. To prevail on a Section 1986 claim Plaintiff must show that: "(1) the defendant had actual knowledge of a § 1985 conspiracy; (2) the defendant had the power to prevent or aid in preventing the commission of a § 1985 violation; (3) the defendant neglected or refused to prevent a § 1985 conspiracy; and (4) a wrongful act was permitted." *Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994). A successful § 1986 claim depends on "proof of actual knowledge by a defendant of the wrongful conduct." *Brandon v. Lotter*, 157 F.3d 537, 539 (8th Cir. 1998). If Plaintiff fails to state a claim under § 1985, there can be no liability under § 1986. *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir. 1977).

B. Motion to Dismiss the § 1985 and § 1986 Claims.

Defendant Hollenback moves to dismiss the claims in the FAC on a variety of grounds. As a threshold matter, Defendant argues that all of the claims are barred by the statute of limitations. Defendant also maintains that Plaintiff has still not complied with the Ninth Circuit's heightened pleadings standard for conspiracy claims. In the alternative, assuming Plaintiff's claims satisfy the heightened pleading standard, Defendant argues that the none of the allegations state a valid claim under the federal civil rights statutes.

//

//

//

//

1. Statute of Limitations.

a. *Section 1985 Claim.*

Federal courts in California apply California's statue of limitations for personal injury actions to claims brought under § 1985. *See Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *McDougal v. County of Imperial*, 942 F.2d 668, 670 (9th Cir. 1991)(applying California's personal injury limitations period to claims brought under § 1983 and § 1985). The personal injury statute of limitations in California is two years. Cal. Code Civ. Pro. § 335.1.[4] Federal law determines the date on which the limitations period begins to run. *Cline v. Brusett*, 661 F.2d 108, 110 (9th Cir. 1981).

In this case, Plaintiff's FAC, filed on June 13, 2006, alleges conduct beginning in 2002 and ranging to the end of 2005. The nature of the alleged conduct can be broken down into two categories. First, there is conduct pertaining to the conspiracies allegedly aimed at interfering with Plaintiff's access to the state judicial system and to employment with the Stanislaus Housing Authority. The latest specific date contained within the Complaint regarding these conspiracies appears to be April 22, 2004, the date on which it is alleged that Defendant Hollenback made various derogatory threats to Plaintiff and similar derogatory remarks concerning Plaintiff to bailiff Jane Doe at the conclusion of a hearing in state court. Second, the

---

[4] Prior to January 1, 2003, California's personal injury statute of limitations was one year. Defendant does not dispute that it is the two year limitations period that applies in this case, as the bulk of the allegedly wrongful conduct occurred after January 1, 2003.

complaint alleges conduct related to the alleged conspiracy to impede Plaintiff's access to this court. The latest date mentioned in this context is December 2005, when "Ashlock refused to honor his agreement with Mr. Jones relating to $27,000 owed to Mr. Jones." (FAC at 67.)

As to the federal court conspiracy, as alleged, the statute of limitations does not expire until December 2007. That claim was timely filed. The earlier conspiracy, however, requires a closer examination of the limitations issue. The Ninth Circuit generally applies the "last overt act" test in determining when a cause of action for conspiracy to deny civil rights accrues.[5] *See Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983). The "last overt act" test is an application of the general rule that a cause of action accrues when a plaintiff learns of the injury and its cause. *Id.* (claim based upon conspiracy to conduct an unconstitutional search accrues on the date of the search).

Here, with respect to the earlier conspiracy to impede access to state court and to employment opportunities, the last date mentioned in the complaint that is arguably an allegation of an overt act was April 22, 2004. On that date Plaintiff was aware of his injury and of its cause. Accordingly, the limitations period on that claim would have expired on April 22, 2006. Unless Plaintiff's June 13, 2006 FAC relates back to an earlier complaint, the claims may be time-barred.

---

[5] The Ninth Circuit has departed from this approach in cases where the alleged conduct "taint[s] or distort[s] the integrity of the truth-finding process and thus den[ies] a fair trial." *Venegas*, 704 F.2d at 1146. In those cases, the primary injury "is the wrongful conviction and resulting incarceration," and, as such, the claim does not accrue until the individual is incarcerated. *Id.*

Defendant asserts that the FAC should not relate back "to one of the numerous Complaints filed in this case, all of which raised different theories of liability (§ 1983, § 1981, and state torts) from what is now alleged (§ 1985 and § 1986)." (Doc. 245 at 8.) But, Defendant misunderstands the relation-back test as it is applied in the federal system. Relation back is governed by Federal Rule of Civil Procedure 15(c), which provides:

> An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(emphasis added). Here, the issue is not whether the particular statutory basis now asserted was previously raised. Rather, the question is whether "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. Pro. 15 (c)(2).

Even a cursory review of the record reveals that earlier-filed complaints alleged the same course of conduct now alleged to be in furtherance of a conspiracy between Hollenback, Jensen,

and various other Stanislaus county officials. Plaintiff's initial complaint, filed on February 3, 2005, mentions threats made by Defendant Hollenback against Plaintiff in connection with a January 22, 2004 hearing and alleges that Hollenback unduly interfered with Plaintiff's job search in a harassing manner on March 29, 2004. (Doc. 1 at ¶¶ 27 & 32.) Similar allegations are made in Plaintiff's first amended complaint, filed March 3, 2005. (Doc. 7 at ¶¶ 27 & 32.) Both these early complaints mention the existence of a "conspiracy" involving Hollenbeck. The numerous complaints filed (properly and improperly) thereafter were arguably part of Plaintiff's ongoing efforts to comply with federal pleading requirements by elaborating upon the alleged conduct and identifying the proper legal basis for his claims. The claims now asserted arose out of the conduct alleged in these two timely-filed complaints.

The motion to dismiss on statute of limitations grounds is **DENIED**. The most recent amended complaint relates back to the February 3, 2005 complaint

b. *1986 Claim.*

Plaintiff's 1986 claims require a different statute of limitations analysis. Section 1986 specifically provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." As discussed, Plaintiff's allegations regarding the federal court conspiracy date to December 2005. Any § 1986 claim based upon that conspiracy would not expire until December 2006. However, the allegations regarding the

conspiracy between Hollenback, Jensen, and other Stanislaus Officials, accrued at the latest, on April 22, 2004. Based on this date, the one year § 1986 statue of limitations expired on April 22, 2005, absent relation-back. Plaintiff's initial complaint, filed on February 3, 2005, describes threats made by Defendant Hollenback against Plaintiff in connection with a January 22, 2004 hearing and alleged that Hollenback unduly interfered with Plaintiff's job search in a racially harassing manner on March 29, 2004. (Doc. 1, paras. 27 & 32.) This complaint precedes the expiration of the § 1986 limitations period. The motion to dismiss this claim on limitations grounds is **DENIED**.

2. Has Plaintiff Properly Pled His Conspiracy Claims?

Defendant argues that Plaintiff's claims should be dismissed both because he has failed to plead all of the elements of the claims asserted and because he has failed to satisfy the heightened pleading standard for conspiracy claims applied in the Ninth Circuit.

As a threshold matter, Defendant again exhibits a misunderstanding of the pleading requirements in federal court. In the portion of Defendant's motion that requests dismissal for failure to state a claim, defendant repeatedly cites to legal standards that set forth the burden of proof that is required on summary judgment or at trial. For example, with respect to Plaintiff's federal court conspiracy claim, Defendant cites *Rutledge v. Arizona Bd. of Regents*, 859 F.2d 732, 735 (9th Cir. 1988). But, *Rutledge* was decided on summary judgment. The

language cited by Defendant from that case is the Ninth Circuit's articulation of the standard of proof that applies to claims on the merits, not the pleading standard that should apply on a motion to dismiss. Defendant again makes this mistake in his challenge to Plaintiff's state law conspiracy allegations, citing to *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29 (1983), for a standard that applies on the merits, not at the pleading stage.

As a general rule, plaintiffs in federal court are not required to plead the elements of a prima facie civil rights case. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002). Plaintiffs are simply required to provide "a short and plain statement of the claim" to give the defendants fair notice of what the claim is and the grounds upon which it is based. *Id.* Although Plaintiff does not have to plead the elements of a prima facie case under section 1985, all of the claims set forth in the FAC are conspiracy allegations, which may be subject to a somewhat heightened pleading standard in the Ninth Circuit.

As a threshold matter, some of the cases cited by Defendant call into question the continued validity of the heightened pleading standard in conspiracy cases. Defendant cites *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994), which held that where evidence of unlawful intent is required to establish liability, allegations of facts must be "specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment." But, a close examination of *Branch* and its progeny reveals that *Branch* has been effectively overruled by *Galbraith v. County of Santa Clara*,

307 F.3d 1119, 1126 (9th Cir. 2002). In *Galbraith*, a three judge panel of the Ninth Circuit examined subsequent Supreme Court precedent, including *Swierkiewicz*, 534 U.S. 506 (disapproving of heightened pleading standards in civil rights cases brought under Title VII), found this precedent to be contrary to the en banc decision in *Branch*, and determined that *Branch* was no longer good law. *Galbraith* eliminated the heightened pleading requirement for improper motive in constitutional tort cases. 307 F.3d at 1125-26.

Despite the holding in *Galbraith*, the Ninth Circuit appears to still apply a heightened pleading standard to conspiracy claims. This pleading standard was first clearly articulated in *Harris v. Broderick*, 126 F.3d 1189 (9th Cir. 1989), which required a *Bivens* conspiracy claim to be "plead with particularity as to which defendants conspired, how they conspired and how the conspiracy led to a deprivation of his constitutional rights..." *Id.* at 1196. More recently, in 2004, two years after the decision in *Galbraith*, the Ninth Circuit again applied a heightened pleading standard to a claim for conspiracy to violate constitutional rights in *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 929 (9th Cir. 2004). But, both *Harris* and *Olsen* relied upon *Branch* to support the application of the heightened standard, the very same case that the Ninth Circuit acknowledged had been overruled in *Galbraith*. Given *Galbraith's* holding, there is reason to question whether a heightened pleading standard applies. At the very least, *Galbraith* suggests the standard should be applied liberally. *Harris* confirms that the complaint should give defendants enough

information about the alleged conspiracy to permit them to frame a response.[6]

The Inquiry turns to whether Plaintiff has satisfied the somewhat heightened pleading standard of *Harris* with his Fifth Amended Complaint.

a. First Clause of 1985(2) - Conspiracy to impede access to federal court.

Plaintiff brings his federal court conspiracy claim under the first clause of § 1985(2), which pertains to conspiracies to obstruct justice in federal court proceedings. To summarize, that claim alleges that Jensen, through landlord Ashlock, used financial pressure to dissuade Plaintiff from pursuing his claims in federal court in this case.

Harris requires at a bare minimum that Plaintiff "plead with particularity as to which defendants conspired, how they conspired and how the conspiracy led to a deprivation of his constitutional rights..." *Id.* at 1196. (Even if Harris does not apply, Plaintiff must plead this claim in a manner that gives Defendant adequate notice of the nature of the claim against him.)

---

[6] The heightened pleading standard as applied to conspiracy cases does appear to still be good law in the Ninth Circuit, *see Olsen*, 363 F.3d at 929, even though other heightened pleading standards have been rejected, *see e.g. Galbraith*, 307 F.3d at 1125-26; *Swierkiewitz*, 534 U.S. 506. Although the *Olsen* court only dedicated one paragraph to the subject, *Olsen*, decided two years after *Galbraith*, is the law of the Ninth Circuit and the district court must follow it. *See Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005).

Here, Plaintiff does not explain anywhere in his complaint how Hollenback was involved in the federal court conspiracy. The only stated explanation of Hollenback's wrongful conduct was "his apparent silence" about the alleged "conspiracy." (*Id.* at ¶67.) This is simply not enough to even put Defendant on notice of the nature of the claim being filed against him.

Any claims based upon the federal court conspiracy are **DISMISSED WITH PREJUDICE**. Plaintiff has been warned several times that he would be afforded no additional opportunities to amend.

b. *Second Clause of 1985 (2) Conspiracy to obstruct justice in state court; and 1985 (3) conspiracy to deprive plaintiff of equal protection under the law.*

Plaintiff has broken his alleged state court conspiracy down into numerous sub-conspiracies:

(1) First, Plaintiff alleges that Hollenback and Jensen conspired to, through the use of threats and intimidation (a) impede Plaintiff's access to state court, (b) impede his ability to pursue his rights under the custody order issued by the Stanislaus County Superior Court, and (c) impede his ability to apply for employment with the Stanislaus County Housing Authority.

(2) Next, Plaintiff alleges that Hollenback conspired with state courtroom bailiff Jane Doe; by telling the bailiff that Plaintiff was a "low life black;" and the bailiff apparently became agitated as a result.

However, Jones asserts that he continued with his scheduled hearing after reassuring the bailiff that he was "not a low life black." This appears to be evidentiary information related to racial animus.

(3) Finally, Plaintiff describes a conspiracy between Hollenback, Tozzi, Carmichael, Strangio, Jensen, the "Jane Doe" bailiff, and Marie Sovey-Silveria to (a) deprive Plaintiff of the opportunity to access state court and (b) deprive Plaintiff of his right to pursue his rights under the custody order and (c) to deprive Plaintiff of his right to petition the courts. In addition, Plaintiff also alleges two additional conspiracies involving all of these individuals to retaliate against him and to aid in planning and concealing the existence of the conspiracy.

Harris requires that Plaintiff "plead with particularity as to which defendants conspired, how they conspired and how the conspiracy led to a deprivation of his constitutional rights..." *Id.* at 1196. With respect to several of the conspiracies alleged, it is not clear how Plaintiff was harmed. For example, the complaint does not allege how Plaintiff's job prospects were actually harmed by the purported threat made by Hollenback. Even more clearly, Plaintiff himself admits that he was not deterred and went forward with the hearing after Hollenback allegedly made racially derogatory remarks to the bailiff. It is not clear how either of these claims could stand alone as separately actionable conspiracy allegations. But, viewing the complaint liberally as is required, it appears that Plaintiff is attempting to describe

pieces of a larger conspiracy to impede his access to state court, specifically to discourage him from pursuing contempt charges against Ms. Chhay.

Plaintiff specifically alleges that both Jensen and Hollenback threatened him, using racially derogatory language, not to proceed with his contempt charges. For example, he alleges that Jensen stated that she and Hollenback were going to "put [Plaintiff's] black ass down...payback is going to be hell." Jensen also allegedly threatened that plaintiff "would get [his] black ass kicked if [he] continued to make trouble for the court and if [he] continued with the contempt proceedings." The FAC also alleges that Hollenback threatened Plaintiff that "he would knock the teeth out of my jive monkey ass if [Plaintiff] showed up for the [pending] contempt hearings." Plaintiff specifically alleges that he did in fact withdraw his contempt charges as a result of these threats.

Plaintiff attempts to tie other co-conspirators into this conspiracy. For example, while Plaintiff's allegations of communications between Hollenback and bailiff Jane Doe (telling her Plaintiff was a "low life black") are not necessarily actionable in and of themselves because Plaintiff was not dissuaded from participating in the particular hearing where those statements were made, the event is arguably circumstantial evidence of a greater effort on Hollenback's part to intimidate Plaintiff. Hollenback's threats pertaining to Plaintiff's pending job application with the Stanislaus Housing Authority are also arguably circumstantial evidence of Hollenback's intent to intimidate him for racially discriminatory reasons. Similarly,

Plaintiff's allegations that other co-conspirators made comments or took actions with "race-based overtones" during the course of various state proceedings are arguably circumstantial evidence tending to show the existence of a conspiracy.

There is no need for Plaintiff to separately allege multiple sub-conspiracies. This only confuses the central issue in this case: Whether there existed a conspiracy to dissuade Plaintiff from pursuing his rights in federal court through threats and intimidation. Plaintiff has sufficiently alleged the existence of such a conspiracy by alleging that (1) Hollenback and others made racially derogatory threats expressly aimed at dissuading him from participating in state court proceedings; and (2) he was influenced to and did withdraw from certain state court proceedings out of fear generated by these threats. There is also some circumstantial evidence tending to suggest that at least some of the named co-conspirators acted together to further the conspiracy. For example, Jensen made strikingly similar threats to Plaintiff, suggesting that there was a common plan in place. Whether any of these threats were actually made remains to be determined on summary judgment or at trial.

Defendant's 12(b)(6) motion to dismiss is **DENIED** with respect to the conspiracy claim based on the alleged threats to dissuade Plaintiff from participating in the contempt proceeding. All of the other, related conspiracy claims are **DISMISSED** because Plaintiff has failed to specifically state how the alleged conspiracies harmed him. But, subject to the Federal Rules of Evidence, all of these allegations can be utilized as circumstantial evidence in support of the remaining conspiracy claim.

C. **Motion for Summary Judgment.**

1. **Should Plaintiff Be Permitted the Opportunity to Conduct Further Discovery?**

Plaintiff asserts that a motion for summary judgment is improper at this point in the litigation and requests that a decision on the pending motion for summary judgment be delayed until he has had an opportunity to conduct additional discovery.

Federal Rule of Civil Procedure 56(f) provides that:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

This rule allows litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence. *United States v. Kitsap Physician Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002). Although 56(f) "may" disallow discovery where the nonmoving party has not submitted evidence supporting its opposition, the Supreme Court has restated the rule as requiring discovery "where the nonmoving party has not had the opportunity to discover information that is essential to its opposition." *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986).

The party seeking additional discovery "bears the burden of showing that the evidence sought exists. Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation." *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir.

1991). Here, Plaintiff stated at oral argument that he has not had an adequate opportunity to conduct discovery on his new legal theory, grounded in 42 U.S.C. §§ 1985 and 1986, in part because he has not possessed adequate funds to conduct thorough discovery. Plaintiff asserts that he will attempt to secure counsel to assist him with the taking of depositions. Alternatively, he will propound further written discovery. Although this case has been pending for more than one and one-half years, much of this time has been spent litigating various challenges to the pleadings. Plaintiff will be afforded a short interval to conduct additional discovery. Plaintiff's discovery shall be completed within **45 days**, commencing on August 14, 2006, the date of oral argument on the instant motions. No further extensions will be granted.

2. The Admissibility of Evidence Contained Within Plaintiff's Declaration.

Although the motion for summary judgment is being continued, one evidentiary objection is discussed here in an effort to clarify the law for the parties. Defendant objects to much, if not all, of the evidence submitted by Plaintiff in his affidavits. For example, Plaintiff asserts in his second affidavit that Jensen threatened him that "[he] would get [his] black ass kicked if [he] continued to make trouble for the court and if [he] continued with the contempt proceedings." Defendant asserts that this, and all similar statements reflecting race-based threats, are inadmissible hearsay. In support of this hearsay objection, Defendant cites *Mahone v. Lehman*, 347 F.3d

1170, 1173 (9th Cir. 2003) and *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 779 (9th Cir. 2002).

In *Orr* the Ninth Circuit considered whether an extrajudicial statement could be offered as evidence that a particular document was submitted to the FDIC. 285 F.3d 764. Specifically, The Plaintiff, Orr, stated in her deposition that a third person, Bourdeau, told Orr that he saw the document at the FDIC's office. The Ninth Circuit found Bourdeau's extra-judicial statement to be inadmissible hearsay because "the immediate inference the proponent wants to draw is the truth of assertion on the statement's face...." *Id.* at 779 n.26. The *Orr* court reasoned that, "[a]lthough [the evidence] was not offered to prove the truth of the matter asserted, it [was] nonetheless hearsay[,]" because the inference counsel sought to draw "depend[ed] on the truth of [the third party's] statement...." *Id.*

The Ninth Circuit reached a similar conclusion in *Mahone*. 347 F.3d 1170. Mahone was a prisoner who, after he acted out violently, was placed into a special strip cell without clothing or any other personal items. Mahone filed a section 1983 claim the prison, in which he alleged, among other things, that he suffered "significant mental trauma" from the conditions of confinement in the strip cell. *Id.* at 1173. The defendants attempted to prove that Mahone was faking the symptoms of mental trauma. Specifically, on cross examination of Mr. Mahone, the following exchange took place:

> **[Defense counsel]:** Mr. Mahone, have you received any diagnosis from any mental health provider or therapist regarding mental and emotional suffering that was a result of your stay in the modified conditions of confinement?

Mahone: "Yes, I have gotten some. I don't know too much of the corpus of the diagnosis, not too much of it."

[Defense counsel] "Can you tell the jury what you've been diagnosed as?"

Mahone's counsel objected on the hearsay grounds, but the objection was overruled.

Mahone responded: Well, I was interviewed by some Western State Hospital staff because I got charged in the incident of tearing up the cell. I have pled not guilty by reason of insanity because at the time I didn't know what I was doing; it was a mental reaction, a reflex. The Western State Hospital psychiatrist-it was about three and one student came to diagnose me, and they said that they believed that I was faking it, and then they gave a real-then they gave a real diagnosis saying I was an anti-sociopathic, something, something. In other words, in the beginning they said that my symptoms that I was experiencing was a fake, that I was lying. And then the last part of their diagnosis, they diagnosed some type of mental illness actually, and it was something to the effect of anti-sociopathic behavior, something, something, big collegiate words, psychiatric collegiate words. I can't say them all.

Id. at 1172-73. Mahone's counsel renewed his objection to the jury learning that the doctor had diagnosed him as a "fake," but the answer was not stricken from the record.

Defense counsel argued that "faker" diagnosis was admissible "to establish whether or not Mr. Mahone was justified in claiming significant mental trauma resulting from the conditions of his confinement in the strip cell." *Id.* at 1173. The Ninth Circuit rejected this argument, following its prior holding in *Orr*, because the "extra-judicial statement was offered to prove that Mr. Mahone was not justified in claiming significant mental trauma...The jury could only draw this inference, however, if it

believed the therapist's opinion that Mr. Mahone was lying about the impact of his confinement in the strip cell." *Id.* Because the relevance of the statement depended on an inference that could be drawn only from the truth of the matter asserted, it was inadmissible hearsay. *See Id.*

The statements at issue here are markedly different. They are being offered, not for the truth of the matter asserted, but for the fact that the statements were made as alleged. A witness' statement about what he heard others say is admissible to establish that racially offensive speech occurred. *Calmat Co. v. United States Dept. of Labor*, 364 F.3d 1117, 1124 (9th Cir. 2004). For example, Plaintiff's allegation that Hollenback called him a "jive-monkey" (FAC at ¶48) is not being offered to establish it is true that Plaintiff is a "jive-monkey," it is being offered to establish that Hollenback made racially offensive remarks to Plaintiff. Plaintiff may testify that such statements were made to him before the finder of fact.

But, with respect to certain statements, Defendant's objection is a bit more sophisticated. Defendant also objects to the use of any of the statements in which one hearsay declarant appears to implicate other individuals or entities in a conspiracy. For example, Plaintiff claims that Jensen said to him "Mr. Hollenback and I are known in this court... you're going to get yours if you keep it up....you just wait, Mr. Hollenback and I have something planned for you boy...we're going to put your black ass down...payback is going to be hell." (Second Affidavit, para 1.) Such statements arguably fall under the rubric of *Mahone* and *Orr* to the extent that Plaintiff offers them

as evidence (directly or impliedly) of the truth of the assertions. For example, this statement would be inadmissible to establish the existence of a conspiracy between Jensen and Hollenback.

Under certain circumstances, such statements might be admissible as "statement[s] by a coconspirator of a party [made] during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). But, co-conspirator statements are only admissible after a court has been satisfied that "there was a conspiracy involving the declarant and the [opposing] party." *See United States v. Peralta*, 941 F.2d 1003, 1005 (9th Cir. 1991).

VI. CONCLUSION

For the reasons set forth above:

1. Defendant's motion to dismiss on statute of limitations grounds is **DENIED**;
2. Defendant's 12(b)(6) motion to dismiss is **DENIED** with respect to the conspiracy claim based on the alleged threats to dissuade Plaintiff from participating in the contempt proceeding. All of the other, related conspiracy claims are **DISMISSED** because Plaintiff has failed to specifically state how the alleged conspiracies harmed him. But, all of these allegations can be utilized as circumstantial evidence in support of the remaining conspiracy claim.
3. The motion for summary judgment is **CONTINUED** to

allow Plaintiff an additional **45 days** to conduct further discovery. (This 45 day period began on the date of oral argument, August 14, 2006.)

4. Any renewed motion for summary judgment shall be filed on or before **September 27, 2006.** Opposition shall be filed on or before **October 27, 2006.** A hearing on the motion is set for **November 27, 2006** at **12:00 p.m. in Courtroom 3.**

SO ORDERED

DATED: August 23, 2006.

OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE